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Supreme Court of the United States

OCTOBER TERM, 1945
No. 822

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET AL.,
Petitioners,

vs.

DANIEL F. DONOVAN (BY SUBSTITUTION),
COLLECTOR OF TAXES FOR THE CITY OF BOSTON,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

WILLIAM H. KERR,
Attorney for Respondent.

CITY OF BOSTON PRINTING DEPARTMENT
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INDEX.

	Page
Introductory Statement	1
Report of Opinions Below	2
Jurisdiction	2
Statement of the Case	2
Argument	5
1. The petition should not be granted as to any question incorporated by reference	5
2. The petition should not be granted as to any specification of error assigned in the brief which is not embraced within the questions expressly presented by the petition	6
3. The petition should not be granted as to Question 1 involving the construction of the order entered by the District Court on June 22, 1944	7
4. The petition should not be granted as to Question 2 concerning the District Court's power to add to, or detract from, its order of June 22, 1944	7
5. The petition should not be granted as to Question 3 relative to the propriety of entering a summary judgment against the principal on a supersedeas bond	8
6. The petition should not be granted as to Question 4 pertaining to the applicability of the Federal Rules of Civil Procedure to condemnation proceedings	9
7. The petition should not be granted as to Question 5 regarding the Seventh Amendment of the United States Constitution	10
8. The petition should not be granted with respect to the question whether, where a supersedeas on appeal delays the payment of a fund to a party determined to be entitled to the immediate possession thereof, the principal and surety on the supersedeas bond are liable to the appellee for the damages caused by the delay incident to the appeal, notwithstanding that the appellate court in disposing of the appeal makes no allowance on account of damages for delay either by way of interest or otherwise	11
Conclusion	15
Appendix	17

TABLE OF AUTHORITIES CITED.

Federal Cases.

	Page
American Trust Co. v. Speers Sand & Clay Works, 60 F. (2d) 994	13
Beall v. New Mexico, 16 Wall. 535	8
Brame v. Keystone Credit Corp., 76 F. (2d) 328, cert. den. 296 U. S. 591	11, 15
Furness, Withy & Co. v. Yang Tsze Insurance Assn., 242 U. S. 430	6
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175	7
Graysonia-Nashville Lumber Co. v. Goldman, 260 F. 600, cert. den. 246 U. S. 663	11, 13
Hiriart v. Ballon, 9 Pet. 156	8
Jerome v. McCarter, 21 Wall. 17	12, 13, 14
John Hancock Mutual Life Insurance Co. v. Thompson, 147 F. (2d) 761	1, 4
Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387	7
Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273	8, 10
Pike v. Gregory, 118 F. 128	12, 14
Rosenstein v. Tarr, 51 F. 368, affirmed *per curiam*, 53 F. 112	12, 14
Saltonstall v. Birtwell, 164 U. S. 54	10
Spruks v. United States Fidelity & Guaranty Co., 45 F. Supp. 773	14
Spruks v. United States Fidelity & Guaranty Co., 138 F. (2d) 812	12, 14
Supervisors v. Kennicott, 103 U. S. 554	12, 14

Federal Statutes, Etc.

28 U. S. C. 347	2
United States Constitution, Seventh Amendment	10
Federal Rules of Civil Procedure, Rule 62 (a)	9, 10
Federal Rules of Civil Procedure, Rule 73	17
Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f)	8, 10, 18
Federal Rules of Civil Procedure, Rule 81 (a) (7)	9, 10
Federal Rules of Civil Procedure, Rule 86	14
Rules of United States Supreme Court, Rule 38 (2)	6
Rules of United States Supreme Court, Rule 38 (5)	15

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RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Introductory Statement.

This is a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the First Circuit affirming a summary judgment entered by the United States District Court for the District of Massachusetts against the principal and surety upon a supersedeas bond filed in connection with the appeal decided by the opinion in *John Hancock Mutual Life Insurance Co.* v. *Thompson*, 147 F. (2d) 761, (C. C. A. 1st, 1944).

In the Circuit Court the record in the case at bar consisted of three parts: Record No. 4079; Record No. 4030, which was incorporated by reference in Record No. 4079 (R. 4079, p. 1); and Record No. 3930, which was in turn incorporated by reference in Record No. 4030 (R. 4030, pp. 1–2).

It is conceded that Record No. 3930 contains no matter essential to a consideration of the case; but, for the sake of completeness, attention is called to the fact that the petitioners have not filed Record No. 3930 with their petition.

Report of Opinions Below.

No opinion was delivered in the District Court with respect to its judgment.

The opinion of the Circuit Court is reported in 151 F. (2d) 751.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under U. S. C., Title 28, Section 347.

Statement of the Case.

This case stems from the proceeding begun by the United States in the United States District Court for the District of Massachusetts for the condemnation, for a term of years, of portions of the Hotel Buckminster at 645 Beacon Street, Boston, Massachusetts, owned by Carlton Hotel, Inc., Debtor (In Proceedings for the Reorganization of a Corporation, United States District Court for the District of Massachusetts, No. 67497), subject, among other encumbrances, to a first mortgage held by the petitioner John Hancock Mutual Life Insurance Company. In November, 1942, a declaration of taking was filed in conjunction with said proceeding, and simultaneously there was deposited with the District Court a sum of money representing the estimated compensation for the taking of the property to June 30, 1943. (R. 4030, p. 2.) In August, 1943, by the filing of an amendment to the declaration of taking and the deposit of the additional sum of $40,000, the property was

taken for the term commencing July 1, 1943, and ending June 30, 1944. (R. 4030, pp. 2–3, 29.)

On February 1, 1944, Merritt Thompson, Collector of Taxes for the City of Boston, filed a petition in the District Court praying that there be paid to him forthwith out of said sum of $40,000 the balance due the City of Boston on the 1942 real estate tax assessed to Carlton Hotel, Inc., on the Hotel Buckminster, as well as the amount of the 1943 tax assessed thereon to John Hancock Mutual Life Insurance Company, with costs and interest. (R. 4030, pp. 12–15.) On May 15, 1944, the Collector's petition for distribution was heard by the District Court. (R. 4030, p. 19.) On June 22, 1944, the District Court entered an order directing its Clerk

> "to pay forthwith to Merritt Thompson as he is collector of taxes for the City of Boston, from the moneys deposited on August 21, 1943 in the registry of this court for or on account of the just compensation to be awarded for the condemnation of the interest in land taken in the above-entitled proceeding, the sum of nineteen thousand nine hundred ninety-eight dollars and nine cents ($19,998.09), together with interest at the rate of $2.12 per day from May 15, 1944 to the date of payment, such disbursement being without prejudice to the right of the City of Boston or of the collector of taxes for the City of Boston to claim further and additional damages for the condemnation of the interest in land taken in the above-entitled proceeding." (R. 4030, p. 19.)

On June 30, 1944, the John Hancock Mutual Life Insurance Company appealed to the Circuit Court of Appeals for the First Circuit from said order of June 22, 1944, and filed, in connection with said appeal, a supersedeas bond in the sum of $1,000. (R. 4030, p. 30; R. 4079, pp. 2–3.) That

appeal was dismissed by the Circuit Court on December 22, 1944. *John Hancock Mutual Life Insurance Co.* v. *Thompson*, 147 F. (2d) 761.

On December 29, 1944, pursuant to the mandate from the Circuit Court and in accordance with the order of the District Court dated June 22, 1944, the Clerk of the District Court paid to the Collector the sum of $20,095.61, being the sum of $19,998.09 specified in said order with interest at the rate of $2.12 per day from May 15, 1944, when the petition for distribution was heard, to June 30, 1944, when the supersedeas bond was filed.

On January 4, 1945, the Collector filed a motion in the District Court that judgment be entered in his favor on the supersedeas bond against the principal and surety thereon and that execution issue for the damages suffered by him by reason of the delay occasioned by the filing of the supersedeas bond, for the costs on appeal, and for interest. (R. 4079, pp. 3–6.) On January 31, 1945, judgment was entered for the Collector against the principal and surety on the bond in the aggregate sum of $624.39, computed as follows:

Interest from June 30, 1944 (when supersedeas bond filed) to December 29, 1944 (when $20,095.61 paid out of registry of District Court) on $20,095.61 at 6% .	$601.22
Costs awarded by the Circuit Court in 147 F. (2d) 761	20.00
	$621.22
Interest at 6% on $621.22 from December 30, 1944, to January 31, 1945 (when judgment entered)	3.17
	$624.39

(R. 4079, pp. 6–7, 10–11.)

From the judgment so entered the principal and surety took an appeal to the Circuit Court, which affirmed the judgment of the District Court. *John Hancock Mutual Life Insurance Co.* v. *Hurley*, 151 F. (2d) 751. The instant petition seeks a review of the decision of the Circuit Court.

The petition for the writ of certiorari (p. 2) and the brief in support thereof (p. 8) both recite that the sum of $604.39 mentioned in the judgment of the District Court (R. 4079, p. 6) was arrived at by computing "interest at the rate of 6% per annum on said sum of $20,095.61 from June 30, 1944 (when the supersedeas bond was filed), to January 31, 1945 (the date of the summary judgment)." This is inaccurate. As indicated above, the sum of $604.39 was arrived at by computing interest at 6% on $20,095.61 from June 30, 1944 (when the supersedeas bond was filed) to December 29, 1944 (when the sum of $20,095.61 was paid out of the registry of the District Court) and adding thereto interest at 6% on $621.22 from December 30, 1944, to January 31, 1945 (when the summary judgment was entered). (R. 4079, pp. 10–11.)

Argument.

1. The petition should not be granted as to any question incorporated by reference.

The petition for the writ of certiorari (p. 5) states: "the petitioners here refer to and incorporate in this petition all of the matters presented in the 'Statement of the Points' (Record, p. 9) with the same force and effect as if herein set out in full." The petition should not be granted as to any question so incorporated by reference.

Rule 38 of the Rules of this Court relates to review on writ of certiorari. Paragraph 2 of that rule pertains to the contents of petitions for such review and provides in part as follows:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) A failure to comply with these requirements will be a sufficient reason for denying the petition. . . ."

This provision plainly requires that the petition itself specify the questions presented. A great number of petitions for review on writ of certiorari are filed with this Court in the course of a year, and the obvious purpose of the provision quoted is to expedite the consideration of those petitions. See especially *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.*, 242 U. S. 430, 433, 434 (1917). If by an examination of the petition the Court cannot ascertain the questions presented, there is a needless consumption of the Court's time.

2. The petition should not be granted as to any specification of error assigned in the brief which is not embraced within the questions expressly presented by the petition.

The five questions specifically set forth in the petition (pp. 3–4) are not, in terms at least, the same as the five specifications of error assigned in the brief supporting the

petition (pp. 9–10). "Whether included in the petition, or separately presented, the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which review is sought. The specifications of error in that brief do not expand or add to the questions stated in the petition." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1938). Accordingly, certiorari should not be granted as to any specification of error assigned in the brief which is not included in the questions specifically brought forward by the petition.

3. The petition should not be granted as to Question 1 involving the construction of the order entered by the District Court on June 22, 1944.

The first specific question presented by the petition seeks a construction of the order for partial disbursement entered by the District Court on June 22, 1944 (R. 4030, p. 19). That order was clearly an order specially written to suit the circumstances of the particular case. Its construction, therefore, is of no great public importance. In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393 (1923), this Court said that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties."

4. The petition should not be granted as to Question 2 concerning the District Court's power to add to, or detract from, its order of June 22, 1944.

The second question set out in the petition is whether the District Court could add to, or detract from, its order of June 22, 1944, after the appeal taken therefrom had been dismissed by the Circuit Court. This question is not open

on the record, for, so far as the record discloses, the District Court never purported to change or modify that order in any way. The mere interpretation of the order in the subsequent proceeding on the supersedeas bond did not add to, or detract from, the order, but simply declared its meaning.

5. The petition should not be granted as to Question 3 relative to the propriety of entering a summary judgment against the principal on a supersedeas bond.

The petitioners next seek to have this Court determine whether Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f), shall be construed to permit making a principal on a supersedeas bond a party defendant in proceedings for summary judgment. While this precise question has never been passed upon, this Court has long recognized the power of courts to render summary judgments on appeal bonds. *Hiriart* v. *Ballon*, 9 Pet. 156, 166, 167 (1835); *Beall* v. *New Mexico*, 16 Wall. 535, 539, 540 (1872); *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 278, 279 (1917). Under the circumstances, there seems to be no special reason why this Court should now review the matter.

Further, Rule 73 (f) of the Federal Rules of Civil Procedure expressly provides that the liability of the surety upon a supersedeas bond may be enforced on motion without the necessity of an independent action. Summary judgment was therefore properly entered against the surety, and the surety makes no contention to the contrary. Thus, even if, upon certiorari, this Court should vacate the judgment as to the principal, the principal would gain only a technical advantage because of the surety's right to reimbursement. Consequently, Question 3 is of illusory, not real, importance.

The petitioners are confused when they say (Petition, p. 5): "Since supersedeas bonds are common in appeals, it is

desirable that it be finally determined whether sureties thereon are to be held liable, not only for judgments against their principals, but also for summary judgments against their principals." The surety here is not being held liable for a summary judgment against its principal, but for the failure of its principal to answer for the damages occasioned by the delay incident to the appeal. The liability of the surety was not conditioned upon the entry of a judgment against the principal with respect to those damages, but became absolute upon the mere failure of the principal to make amends for those damages.

6. The petition should not be granted as to Question 4 pertaining to the applicability of the Federal Rules of Civil Procedure to condemnation proceedings.

The fourth question raised by the petition is: "Do the Federal Rules of Civil Procedure apply, except with respect to appeals, to condemnation proceedings?" This question does not present a justiciable controversy, for the matter is settled by Rule 81 (a) (7) of the Federal Rules of Civil Procedure, which provides: "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable."

It is recognized that the Circuit Court relied on Rule 62 (a) of the Federal Rules of Civil Procedure when it interpreted the District Court's disbursement order of June 22, 1944, as directing the Clerk of the District Court to make payment upon the expiration of ten days after the entry of the order; but, as has already been observed, the construction of that order is not a matter of importance to the public and should not be reviewed on writ of certiorari. If the petitioners were aggrieved by the Circuit Court's

erroneous application of Rule 62 (a), they should have called the Circuit Court's attention to Rule 81 (a) (7) by a petition for a rehearing.

7. The petition should not be granted as to Question 5 regarding the Seventh Amendment of the United States Constitution.

The fifth and last question specifically set out in the petition inquires whether Rules 73 (d), (e) and (f) of the Federal Rules of Civil Procedure, if construed to permit the rendition of a summary judgment against the principal on a supersedeas bond, violate the Seventh Amendment of the United States Constitution preserving the right of trial by jury.

Both the petition (p. 3) and the brief in support thereof (p. 9) recite that the petitioners by their appeal to the Circuit Court challenged the judgment of the District Court on the constitutional ground stated. However, the Statement of Points (R. 4079, p. 9) does not mention any constitutional question, and the opinion of the Circuit Court does not indicate that any such question was considered. This Court should not issue a writ of certiorari to determine a question not assigned or considered in the Circuit Court. *Saltonstall* v. *Birtwell*, 164 U. S. 54, 70 (1896).

It may not be inappropriate to add, nevertheless, that the constitutional right of trial by jury presents no obstacle to summary proceedings in cases of this kind, since by entering into the bond the parties submit themselves to be governed by the fixed rules which regulate the practice of the court. *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 278 (1917), and cases cited.

8. The petition should not be granted with respect to the question whether, where a supersedeas on appeal delays the payment of a fund to a party determined to be entitled to the immediate possession thereof, the principal and surety on the supersedeas bond are liable to the appellee for the damages caused by the delay incident to the appeal, notwithstanding that the appellate court in disposing of the appeal makes no allowance on account of damages for delay either by way of interest or otherwise.

The principal question considered by the Circuit Court in the case at bar was whether, where a supersedeas on appeal delays the payment of a fund to a party determined to be entitled to the immediate possession thereof, the principal and surety on the supersedeas bond are liable to the appellee for the damages caused by the delay incident to the appeal, notwithstanding that the appellate court in disposing of the appeal makes no allowance on account of damages for delay either by way of interest or otherwise. The Circuit Court answered the question in the affirmative. The petitioners maintain that a negative answer should have been given. (Petitioners' Brief, pp. 10 ff.) Undoubtedly petitioners intended to bring the question forward; but, in view of their failure to set it out specifically in their petition, it is submitted that the question is not brought forward.

If the petition is construed to raise the question, however, a writ of certiorari should not issue; for the judgment which the petitioners here seek to have reviewed is supported by *Graysonia-Nashville Lumber Co.* v. *Goldman*, 260 F. 600 (C. C. A. 8th, 1919), certiorari denied 246 U. S. 663, and *Brame* v. *Keystone Credit Corp.*, 76 F. (2d) 328 (C. C. A. 4th, 1935), certiorari denied 296 U. S. 591, as well as by the numerous other cases cited in the learned opinion of the Circuit Court.

The petition (pp. 4–5) prays for the issuance of a writ because of an alleged conflict between the decision of the Circuit Court and the following cases: *Jerome* v. *McCarter*, 21 Wall. 17 (1874); *Supervisors* v. *Kennicott*, 103 U. S. 554 (1880); *Rosenstein* v. *Tarr*, 51 F. 368 (C. C. Mass., 1892), affirmed *per curiam*, 53 F. 112 (C. C. A. 1st, 1892); *Pike* v. *Gregory*, 118 F. 128 (C. C. A. 1st, 1902); and *Spruks* v. *United States Fidelity & Guaranty Co.*, 138 F. (2d) 812 (C. C. A. 3d, 1943).

In the petitioners' brief (p. 12) it is said: "The precise point here in issue was early determined in *Jerome* v. *McCarter*, 21 Wall. 17, and in *Supervisors* v. *Kennicott*, 103 U. S. 554, . . ." It is submitted that the precise point here in issue was not decided in those cases. Both of those cases involved a petition to foreclose a mortgage. The decrees appealed from adjudicated the amount of the debts due and directed that certain property be sold and the proceeds applied on account of the debts. The effect of the filing of the supersedeas bonds was to stay the mortgage foreclosure sales. To illustrate the situation, let us suppose that a debt of $1,000,000 was secured by property worth $50,000 at the time of the entry by the inferior court of the decree ordering the foreclosure sale, and that the value of the property remained constant while the appeal was pending. Obviously, the mortgagee was not deprived of the use of $1,000,000 during the pendency of the appeal, and the appellant is not liable for the interest accumulating thereon during that period. This, it is submitted, is all that was decided by *Jerome* v. *McCarter* and *Supervisors* v. *Kennicott*.

In the illustration just put, however, the mortgagee was deprived of the use of $50,000 during the pendency of the

appeal, for, had the foreclosure sale not been stayed by the supersedeas bond, the mortgagee could have realized $50,000 forthwith. The mortgagee was therefore entitled to damages to compensate him for the loss of the use of $50,000.

The distinction drawn in the illustration just given was drawn in *Graysonia-Nashville Lumber Co.* v. *Goldman*, 260 F. 600 (C. C. A. 8th, 1919), certiorari denied 246 U. S. 663, and in *American Trust Co.* v. *Speers Sand & Clay Works*, 60 F. (2d) 994 (D. C., Md., 1932). In the *American Trust Co.* case, Judge Chesnut of the District Court of Maryland, after ruling that the accumulation of interest was not within the liability of the bond, said (p. 999):

> "But I think it does not follow that no allowance for interest can be made in this case. The effect of the appeal from the decree for sale was to delay the sale for a period of about fourteen months. If this delay had not been occasioned by the unsuccessful appeal, the plaintiff would presumably have received interest on the final purchase price of $6,000 for this period, or would have had the fund of $6,000 finally realized at the end of 14 months available for earning interest fourteen months earlier. See *Jerome* v. *McCarter*, 21 Wall. 17. A similar allowance for interest on the delayed receipt of the purchase price was made against the surety on supersedeas bond in a mortgage foreclosure sale in *Graysonia-Nashville Lumber Co.* v. *Goldman*, 260 F. 600, 605. The allowance was made not for the accumulation of interest on the mortgage debt but as an item of damages for delay incident to the appeal."

In *Graysonia-Nashville Lumber Co.* v. *Goldman, supra*, the supersedeas bond caused the postponement of the foreclosure sale from July 10, 1917, to April 29, 1918, when

the property was sold for $250,000. In the course of the opinion (p. 605), the Court states:

> "It is said that it was error to allow this interest, because interest is never allowed on any decree that is not for a sum of money or is silent as to interest, and that there was no judgment for money against the Graysonia Company [the appellant], and no provision for interest in the decree of foreclosure. But this $12,040 is not interest on any judgment, or on the decree, or on the amount thereof. It is the legal damages the plaintiff sustained because the Graysonia Company delayed his receipt of the $250,000 derived from the sale from June [July?] 10, 1917, to April 29, 1918."

It follows that the opinions in *Jerome* v. *McCarter, supra,* and *Supervisors* v. *Kennicott, supra,* are not in conflict with the conclusion reached by the Circuit Court in this case.

Since *Rosenstein* v. *Tarr, supra,* and *Pike* v. *Gregory, supra,* arose in the same circuit as the instant case, the effect of the decision of the Circuit Court in the present controversy is to overrule those cases. No case has been found where this Court granted certiorari merely because a circuit court overruled itself.

Spruks v. *United States Fidelity & Guaranty Co.,* 138 F. (2d) 812 (C. C. A. 3d, 1943), is distinguishable. The bond was given on September 29, 1936. See *Spruks* v. *United States Fidelity & Guaranty Co.,* 45 F. Supp. 773 (D. C., M. D. Penn., 1942). Hence, just as *Rosenstein* v. *Tarr, supra,* and *Pike* v. *Gregory, supra, Spruks* v. *United States Fidelity & Guaranty Co.,* 138 F. (2d) 812 (C. C. A. 3d, 1943), involves a bond given prior to the effective date of the Federal Rules of Civil Procedure. (See Rule 86.)

Conclusion.

In conclusion, attention is called to two additional matters. First, the prior appeal in the case at bar was not considered on its merits but was dismissed because the appellant was not aggrieved by the order below. It is inconceivable that a party having no appealable interest can delay the distribution of a fund and yet avoid answering for the damages resulting from such delay, especially when such party has given bond agreeing to "answer all damages and costs if it fails to make its appeal good."

Further, the earlier appeal might have been prosecuted without a supersedeas, but it was elected not to do so. Having elected to take this course, it is only just that those responsible for the delay in the payment of the fund to the person entitled to it should respond in damages in a sum equal to the amount of the loss brought about by the course pursued. *Brame* v. *Keystone Credit Corp.*, 76 F. (2d) 328, 331, 332 (C. C. A. 4th, 1935), certiorari denied 296 U. S. 591.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rules of the Supreme Court, Rule 38 (5). It is respectfully suggested that there is no special and important reason to review a judgment assessing damages against one in a position closely resembling that of an officious intermeddler, who, having elected to take a certain course, seeks to avoid answering for the damages resulting from the course pursued.

For the various reasons set forth above, it is submitted that the petition for a writ of certiorari should be denied with costs to the respondent.

Respectfully submitted,

DANIEL F. DONOVAN, as he is
Collector of Taxes for the City of Boston,

By WILLIAM H. KERR,
His Attorney.